Supreme Court, U.S.
FILED
(1)
No. 961159 JAN 21 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

CITY OF PITTSBURGH,

Petitioner,

v.

ROBERT G. BECK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari

George R. Specter*
Deputy Solicitor
Susan E. Malie
Assistant City Solicitor
Jacqueline R. Morrow
City Solicitor
CITY OF PITTSBURGH
Department of Law
Firm #046
313 City-County Building
414 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 255-2002

** Counsel of Record*
Counsel for the Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

47 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Third Circuit appropriately eliminated the burden of plaintiffs to introduce evidence of "deliberate indifference" in causes of action advanced against municipalities under 42 U.S.C. §1983 when it eliminated the burden of plaintiffs to introduce any evidence, through expert testimony or otherwise, to which the trier of fact may compare the challenged customs, policies or practices employed by municipalities before rendering a decision as to whether deficiencies in such customs, policies or practices exist which may amount to "deliberate indifference"?

II. Whether the Court of Appeals for the Third Circuit has violated principles of federalism by enabling Federal Courts to independently establish requisite criteria and standards for adequate supervision, training, investigation and discipline of municipal police officers?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR ISSUANCE OF WRIT 4

CONCLUSION 10

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASELAW

Cafeteria and Restaurant Workers' Union Local 473 A.F.L.-C.I.O. v. McElroy,
367 U.S. 886, 81 S.Ct. 1743,
6 L.Ed.2d 1230 (1961) 10

City of Canton v. Harris,
489 U.S. 378, 103 L.Ed. 2d 412,
109 S.Ct. 1197 (1989) 6, 7, 9, 10

Mark v. Borough of Hatboro,
51 F.3d 1137 (3d Cir. 1995) 9

Monell v. New York City Dept. of Social Services,
436 U.S. 658, 98 S.Ct. 2018,
56 L.Ed. 2d 611 (1978) 4, 6, 9, 10

Oklahoma City v. Tuttle,
471 U.S. 808, 105 S.Ct. 2427,
85, L.Ed. 2d. 791 (85) 6

Rizzo v. Goode,
423 U.S. 362, 96 S.Ct. 598,
46 L.Ed. 2d 561 (1976) 6, 10

Sampson v. Murray,
415 U.S. 61, 94 S. Ct. 937,
39, L.Ed.2d 166 (1974) 10

Stefanelli v. Minard,
342 U.S. 117, 72 S. Ct. 118, 96 L.Ed. 138 (1950)...10

Vann v. City of New York,
72 F.3d 1040 (2d Cir. 1995).....9

STATUTES AND RULES OF COURT

42 U.S.C. §1983 1-9

OPINIONS AND ORDERS OF THE COURTS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania is transcribed at pages 186 through 195 of the trial transcript. (App. 22). The Opinion of the United States Court of Appeals for the Third Circuit is reported at 89 F.3d 966 (1996). (App. 1) Both Opinions have been reproduced and annexed hereto.

JURISDICTION

Judgment was entered in the within action on July 22, 1996. Jurisdiction of this Court is conferred under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV OF THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)

STATEMENT OF THE CASE

Robert Beck asserts that on October 31, 1993, he was subjected to the use of excessive force by City of Pittsburgh Police Officer Anthony Williams, such use of force having resulted from an alleged custom of the City of Pittsburgh as manifested through the City's failure to adequately investigate and discipline its police officers for use of excessive force. Beck asserts these claims under 42 U.S.C. §1983 and the Fourth Amendment to the United States Constitution.

In an attempt to establish the basic elements of his claim against the City, i.e., that Beck's injuries were "caused" by the "deliberate indifference" of the City as manifested through deficiencies in the City's investigative and disciplinary systems, Beck introduced the following evidence at trial: (a) Testimony of Carla Gedman explaining the City's systems for conducting investigations of alleged police misconduct through its Office of Professional Standards, ("OPS"); (b) Testimony of Charles Moffatt explaining the disciplinary systems utilized by the Police Bureau; (c) Testimony relating to complaints of misconduct filed with OPS against Officer Williams; and (d) Year-end reports prepared by OPS containing notes and

statistics relating to misconduct complaints filed against City Police Officers.

At the close of Beck's case, the City moved for judgment as a matter of law on the basis that Beck had failed to present any evidence which might support the deliberate indifference element of his §1983 claim against the City. The City argued that while Beck introduced detailed evidence concerning the systems actually employed by the City, i.e., those which were subject to challenge, Beck failed to introduce any evidence of an acceptable standard against which a jury could possibly compare those systems so as to assess deficiencies therein.

The District Court agreed, and, granting the City's motion, stated:

> You would have the jury infer that because Williams was never disciplined, the city tacitly authorized the use of excessive force. But I think the law is clear that the jury can't make that assumption. Judge Cohill has an opinion in this court saying that isolated events will not establish a pattern of abusive behavior. Recitation of the number of complaints filed is not sufficient to prove a policy or custom. Policy or custom has to be established by knowledge and acquiescence. I think absent any evidence of a failure to investigate or evidence of a less than meaningful investigation or less than meaningful response to complaints of excessive force is fatal. (App. 26).

The Court of Appeals for the Third Circuit reversed the decision of the Trial Court on the following basis: That "[i]t is not beyond the ken of an average juror to assess what a reasonable municipal policymaker would have done with the information in this case" (App. 21); and that Beck "Presented

sufficient evidence from which a reasonable jury could have inferred that the City of Pittsburgh knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers." (App. 21)

REASONS FOR ISSUANCE OF THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONTRAVENTION OF MONELL V. DEPARTMENT OF SOCIAL SERVICES AND ITS PROGENY AS THE COURT OF APPEALS HAS ENTIRELY EMASCULATED THE INTENDED PURPOSE AND EFFECT OF THE DELIBERATE INDIFFERENCE REQUIREMENT IN ACTIONS ADVANCED UNDER 42 U.S.C. §1983.

The Court of Appeals for the Third Circuit has effectively emasculated the deliberate indifference requirement in actions advanced against municipalities under 42 U.S.C. §1983, in direct contravention of the mandate of this Court as expressed through the seminal decision of Monell v. Dept. of Social Services, 436 U.S. 658 (1978) and its progeny. Pursuant to its holding herein, the Third Circuit has exposed municipalities to unprecedented *de facto respondeat superior* liability and extreme inconsistency at a time when municipalities seek guidance relative to the duties attendant to their role as supervisor, trainer, investigator and disciplinarian of municipal police officers.

The Opinion of the Third Circuit dictates that the disposition of causes of action challenging the sufficiency of municipal policies, customs and practices relative to supervision, training, investigation and discipline of police officers may be hinged solely upon the independent criticism, conjecture and personal lay opinions of the Court and jury. Thus, contrary to the mandate of this Court and consistent

theories adopted by Courts of Appeals throughout the country, the Third Circuit has eliminated the burden of plaintiffs to produce evidence which would demonstrate that municipal policies, customs or practices which are challenged under §1983 are contrary to, or fall short of, accepted "industry" standards, such standards being defined through expert testimony or by comparison with methods utilized by other similarly situated municipalities. Simply, plaintiffs are no longer required to introduce evidence of an acceptable standard policy, custom or practice, through expert testimony or otherwise, to which the fact-finder may compare the municipal policy, custom or practice in question so as to render an informed decision as to the sufficiency of such policy, custom or practice.

Rather, the Third Circuit will permit juries to infer deliberate indifference solely on the basis of evidence relating only to the policy, custom or practice actually utilized by the municipality. The consequence of the Third Circuit's decision has been the imposition of *de facto respondeat superior* liability on municipalities across the country under Section 1983, a result this Court expressly considered and unequivocally rejected.

In an action involving the alleged failure of the City of Canton to adequately train its police department, such failure having allegedly resulted in the failure of an officer to provide medical care to the plaintiff, this Court expressly laid the following foundation in support of its pronouncement that the deliberate indifference standard shall be applied to actions such as that *sub judice*:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under Section 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the city "could have done"

> to prevent the unfortunate incident. See Oklahoma City v. Tuttle, 471 U.S., at 823, 105 S.Ct., at 2436 (opinion of REHNQUIST, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under Section 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities-a result we rejected in Monell; 436 U.S., at 693-694, 98 S.Ct., at 2037. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake as well as one that would implicate serious questions of federalism. Cf. Rizzo v. Goode, 423 U.S. 362, 378-380, 96 S.Ct. 598, 607-608, 46 L.Ed.2d 561 (1976).

City of Canton v. Harris, 489 U.S. 378, 390 (1961).

In direct contravention of the above mandate of this Court, the Beck decision provides that every §1983 plaintiff advancing a claim for failure of a municipality to adequately train, supervise, investigate or discipline need only elicit testimony from the defendant-municipality itself relative to the training, supervisory, investigative or disciplinary procedures actually utilized by the defendant-municipality, and from this evidence, a jury may simply "infer" that the municipality was deliberately indifferent. Such a standard defies the language of Canton and subverts the very purpose of the Court's imposition of the deliberate indifference standard.

Under Beck, neither the Court nor the jury will be offered any guidepost against which they could possibly measure alleged degrees of deficiency in procedures utilized by municipalities. A jury may, with no further guidance, and regardless of the effort employed or sophistication of a municipal policy, simply infer deliberate indifference utilizing

any criteria it so chooses. Under Beck, a Court or jury may, on its own initiative, devise procedures and guidelines which a particular Court or jury alone deems acceptable for the limited purpose of its deliberations relative to a particular case, and compare that particular "jury's standard" to a municipality's existing procedures. With this "information", a jury may, based upon sheer speculation and conjecture, infer that a municipality "must have been" deliberately indifferent and "must have" caused the plaintiff's injury.

The arbitrary and capricious nature of such a process is readily apparent. At a time when municipalities seek direction in formulating adequate systems for responding to most serious issues, the Court of Appeals has held that municipalities must be left to decipher the whims of each random jury before whom such cases are tried, and that, regardless of the efforts of the municipality, culpability may be inferred on the basis of nothing more than mere conjecture.

Resolution of issues raised by claimants such as Robert Beck does not lie neatly within the pages of textbook guidelines and learned treatises as might be the case in litigation involving allegations of medical malpractice or design defect. Rather, given the latent complexity of issues raised by §1983 claimants, the unique nature of a police officer's role in our communities and the evolution of and disparity between the needs, resources and concerns of individual communities, complete, consistent and accurate resolution can only be achieved through careful analysis of practical experience of municipalities and relevant field of expertise, including, without limitation, sociology, psychology, economics and management.

Indeed, everyone has his or her own personal opinion concerning relative degrees of discipline which "could" be imposed or of what might constitute an ideal investigative process. As the City of Canton Court states, "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city "could have done". City of Canton,

489 U.S. at 390. However, such use of isolated personal opinions and criticism as a standard relative to that which a municipality "could have done" has been expressly rejected by this Court on the basis that this cannot reasonably be deemed the standard by which a municipal defendant charged with the responsibilities and burdens at issue is to be judged, particularly where the standard will vary from jury to jury, as such a malleable standard effectively imputes *de facto respondeat superior* liability upon all municipalities.

Upon review of direct evidence of particularized, acceptable standards and guidelines, juries may make reasoned, educated and consistent determinations of whether municipalities indeed fall short of recognized and consistent standards and guidelines and whether such inadequacies amount to deliberate indifference. Without such guidance, a jury cannot, with any degree of certainty, gauge the deficiencies, if any, within a municipal system.

The City of Pittsburgh has been engaged in an ongoing effort to improve its methods of training, discipline, supervision and investigation as the City recognizes and accepts the duties and responsibilities attendant to management of its Police Bureau. However, the City respectfully submits that the Third Circuit has imposed an insurmountable burden upon municipalities, rendering it impossible for any municipal government to comply with any degree of certainty to the varying standards which will be imposed by courts and juries in the future. The City respectfully disagrees with the Appellate Court's characterization as "ridiculous" the City's contention that expert direction is necessary to streamline the varying and complex possibilities available to municipalities as instructor and disciplinarian since it is the case, upon review of the Opinion of the Court of Appeals, that while reasonable minds may differ as to what the City "could have done", no evidence has been proffered, and by virtue of the Court's Opinion, no evidence will be required in the future in this and other §1983

cases and thus, no direction will be shed as to what the City "should have done".

The District Court rendered its decision on the basis of reasoned precedent of this Court, prior decisions of the Third Circuit as well as decisions of other Circuit Courts of Appeals, See, e.g., Monell, Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995), Vann v. City of New York, 72 F.3d 1040 (2d Cir. 1995), all of which reject the conclusions of the Third Circuit in Beck.[1] To accept the decision of the Third Circuit is to affirm imposition of vicarious liability against municipalities under §1983 in direct contradiction of the mandate of this Court.

II. THE THIRD CIRCUIT HAS VIOLATED BASIC PRINCIPLES OF FEDERALISM BY ENABLING FEDERAL COURTS TO ESTABLISH THE CRITERIA AND STANDARDS FOR SUPERVISION, TRAINING, INVESTIGATION AND DISCIPLINE OF MUNICIPAL POLICE BUREAUS.

The "serious questions of federalism" to which the City of Canton Court refers have also been implicated by the Circuit Court's decision. The Beck Court has held that federal courts, including random juries, without the aid of expert testimony or evidence of applicable standards and guidelines, can "engage. . . in an endless exercise of second-guessing" municipal procedures, an "exercise [the Supreme Court] believe[s] the federal courts are ill suited to undertake". City of Canton, 489 U.S. at 390. If it is the Court's intention to allow Federal Courts to critique municipal procedures for training, discipline, supervision and investigation using a given Federal Court's or jury's own independent criteria, such a theory runs directly afoul of principles of federalism.

---

[1] See also, Fulwood v. Quentin Porter, 639 A.2d 594, 600-60 (D.C. App. 1994) wherein the District of Columbia Court of Appeals expressly rejected the theory now adopted by the Court of Appeals for the Third Circuit.

The federal government is one of limited expressed powers, all other powers being reserved to the States. U.S. Constitution, Amend. 10. Thus, where, as here, the exercise of authority by state officials is attacked, federal courts must consistently be mindful of the special delicacy of the balance to be preserved between federal power and a state's administration of its own laws. Rizzo v. Goode, 423 U.S. 362, 378 (1976), citing, Stefanelli v. Minard, 342 U.S. 117, 120 (1950). The courts must contend with "the well established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." Cafeteria and Restaurant Workers' Union Local 473 A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 896 (1961), cited with approval, Sampson v. Murray, 415 U.S. 61, 83 (1974); Rizzo, 423 U.S. at 379.

The City of Pittsburgh respectfully submits that the adequacy of its methods for monitoring the City's own internal affairs, i.e., procedures relative to training, discipline, supervision and investigation, is to be judged in the context of particularized, acceptable "industry" standards which are defined by knowledgeable parties, not against criteria independently developed and imposed in a vacuum by District Courts and juries. Thus, while the federal judicial system may be utilized to resolve the issue of whether acceptable standards have been violated, the system may not be used to establish acceptable standards *sua sponte*.

CONCLUSION

Petitioner prays that the within Petition be granted and the judgment of the Court of Appeals be reversed consistent with the decisions of this Court in Monell v. New York City Dept. of Social Services and City of Canton v. Harris.

Respectfully Submitted,

George R. Specter
Deputy City Solicitor
Pa. I.D. #01017

Susan E. Malie
Assistant City Solicitor
Pa. I.D. #68998

Jacqueline R. Morrow
City Solicitor
Pa. I.D. #37222

City of Pittsburgh
Department of Law
Firm #046
313 City-County Building
414 Grant Street
Pittsburgh, PA 15219
(412) 255-2002

DATED: January 17, 1997

No. _____

In The

Supreme Court of the United States

October Term 1996

CITY OF PITTSBURGH,

Petitioner,

v.

ROBERT G. BECK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix to Petition for Writ of Certiorari

George R. Specter*
Deputy Solicitor
Susan E. Malie
Assistant City Solicitor
Jacqueline R. Morrow
City Solicitor
CITY OF PITTSBURGH
Department of Law
Firm #046
313 City-County Building
414 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 255-2002

** Counsel of Record*
Counsel for the Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

TABLE OF CONTENTS
Appendix to Petition

Appendix Page

Opinion,
United States Court of Appeals
for the Third Circuit,
entered July 22, 1996 . . . . . App.1

Opinion,
United States District Court
for the District of Pennsylvania
entered May 11, 1995 . . . . . App.22

Order,
Denying Petition for Rehearing with
Suggestion for Rehearing In Banc,
United States Court of Appeals
for the Third Circuit,
entered October 24, 1996 . . . . . App.29

IN THE UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT

Robert BECK,
Appellant,

v.

CITY OF PITTSBURGH,
Appellee.

No. 95-3328.

Argued May 21, 1996.
Filed July 22, 1996
Entered: July 22, 1996

An Appeal from the United States District Court for the Western District of Pennsylvania D.C. No 94-cv-156

Colin E. Fitch, Esquire (argued) Marriner & Crumrine 800 Washington Trust Building Washington, PA 15301 Counsel for Appellant

Virginia S. Scott, Assistant City Solicitor (argued) Jacqueline R. Morrow, City Solicitor City of Pittsburgh Department of Law Firm #046 313 City-County Building 414 Grant Street Pittsburgh, Pa 15219 Counsel for Appellee

Before SLOVITER, Chief Judge, SAROKIN and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

1. This appeal raises a question of considerable interest in this period of alleged rising police brutality in major cities across the county: [1] when does an aggrieved citizen adduce sufficient evidence to a jury from which it can infer that a municipality has adopted a custom of permitting its police officers to use excessive force in the performance of their duties. Specifically, we must determine if the plaintiff, Robert G. Beck, presented sufficient evidence to withstand a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a).

Beck, a rehabilitation counselor for the Epilepsy Foundation of America, sued Police Officer Anthony Williams and his employer, the City of Pittsburgh, in the United States District Court for the Western District of Pennsylvania, under 42 U.S.C. §1983, for deprivations of his constitutional rights. Beck alleged that Williams engaged in police brutality and used excessive force against him while making an arrest, and that the City of Pittsburgh's custom of tacitly authorizing its police officers to use excessive force resulted in Beck's personal injuries and damages. Beck brought additional pendent state law tort claims against Officer Williams.

The district court bifurcated Beck's cases against Williams and the City of Pittsburgh. Beck's case against Williams ended in a mistrial when the jury could not return a verdict. Beck dropped his case against Williams, and proceeded only against the City. After Beck presented his case, the City moved for judgment as a matter of law. The court granted the motion, holding that Beck presented insufficient evidence for a reasonable jury to find that the City

---

[1] See generally Pierre Thomas, Police Brutality: An Issue Rekindled, WASH. POST, Dec. 6, 1995, at A1.

of Pittsburgh had established a policy or custom tacitly authorizing its police officers to use excessive force. Beck timely appealed to this court.[2] We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.[3]

I.

In the early morning hours of October 31, 1993, Beck and two college friends left a Halloween party on the South Side of Pittsburgh. Beck had borrowed his parents' car for the evening, and parked it in a vacant lot near the party site. It had begun to sleet, and as Beck began to drive the car toward the exit of the parking lot, it skidded in circles on the wet pavement. Although the parties have differing views on what occurred next, for the purposes of this appeal, we must view the evidence in a light most favorable to Beck, the nonmoving party. See Macleary v. Hines, 817 F.2d 1081, 1083 (3d Cir. 1987). Thus, we take the facts from Beck's testimony and other evidence presented by him at trial.

Beck testified that Officer Williams, working alone, blocked the only exit from the lot with his police cruiser. Williams stopped Beck's car, and ordered him out of the vehicle. Beck claimed that he complied with all of Officer Williams's commands. Williams kicked the door shut as Beck attempted to get out of his car, then jerked open the door, and pushed his gun into Beck's face. After cursing at Beck and using obscene language, Williams allegedly struck him in the

---

[2] The district court properly exercised jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331. This court may hear the appeal as a final judgment of the district court. See 28 U.S.C. §1291.

[3] We also reject the City's argument on appeal, that Beck failed to plead a viable §1983 claim. Even if we were to agree with the City that the complaint itself does not adequately present the claim, it was "tried by express ... consent of" the City, and therefore we treat the claim "in all respects as if [it] had been raised in the pleadings." Fed.R.Civ.P. 15(b).

face six to eight times with the end of his gun, pulled Beck from the car, forced him to the ground, and kicked him in the ribs. At this time, several other police officers arrived at the scene. An officer placed Beck into Williams's police vehicle, and Williams, alone, removed Beck to the police station. There, he charged Beck with "driving under the influence" and reckless driving, and lodged him in a cell.

*2 Subsequently, Beck filed a formal civilian complaint with the Police Department against Williams. The Office of Professional Standards ("OPS"), the city department responsible for investigating complaints against police officers, investigated. OPS took statements from Beck, his two companions who witnessed the incident, and Officer Williams. Although Beck's friends fully supported Beck's allegations, OPS found Beck's complaint to be unfounded, noting that the mug shot taken on the night he was in custody did not reveal any evidence of the trauma he claimed.

At trial, Beck called Carla Gedman, a civilian assistant chief of OPS, as a witness. Gedman supervises all OPS employees and investigators, and is responsible for forwarding all OPS findings through the chain of command in the Pittsburgh Police Department to the Chief of Police.[4] Gedman testified that OPS acts as a fact-finding body, and is not responsible for disciplining police officers. OPS merely investigates each complaint against an officer for use of excessive force, and decides whether the complaint is "unfounded," "exonerated," "not sustained," "sustained," or "closed by memo." It makes no recommendations. OPS merely forwards its result to Police Department officials (see

---

[4] OPS is an investigating agency of the City. It investigates allegations of misconduct for fire, police, building inspectors, administrative personnel in police safety, and performs background investigations for all prospective employees. After OPS completes its fact finding, its conclusions are reviewed by the police chain of command: the city's assistant chief of operations, the police officer's commander, the Chief of Police, and the director of public safety.

supra note 4). The Department may overturn any OPS finding. Gedman could not remember, however, if the Department ever actually had reversed an OPS finding.

Gedman testified that OPS will classify a complaint as "unfounded" when the facts indicate that the compliant is untruthful or inaccurate: and as "exonerated" when everything the complainant states is true, but OPS finds that the officer followed proper police procedure. OPS will label a complaint as "closed by memo" when a complainant drops the claim, or is uncooperative in the investigatory process. Further, OPS applies a preponderance of evidence standard in determining whether to sustain a complaint. Gedman explained that the complainant has the burden of showing that 51% of the evidence supports his or her version of the incident. Beck contends that OPS's preponderance standard mandates a finding of "not sustained" whenever OPS is faced with only the complainant's word against the officer's word. Gedman stated that she "wouldn't be comfortable" with that assessment. She testified, however, that a finding of "not sustained" amounts to a "draw," where OPS can neither prove nor disprove the allegations.

According to Gedman, OPS approaches each complaint against a police officer as a separate, independent event. Thus, OPS cabins each complaint and will not consider prior conduct of or prior complaints against the officer in determining the outcome of the pending complaint. Gedman further testified that OPS has no formal policy or mechanism in place to track prior complaints. She noted that, in the exercise of her discretion, she may alert police officials if she notices that an officer has a number of complaints against him or her within a short period of time, e.g., two months. From her perspective, Gedman testified that she did not consider prior complaints of the use of excessive force relevant in assessing the pending complaint under investigation. She further stated: "We do not report patterns of cases to the police bureau." However, the OPS annual report does contain

statistics of complaints relating to police use of excessive force and statistics pertaining to complaints of police verbal abuse. In some cases where Gedman believes it to be relevant, Gedman testified that she may report a series of incidents to the chain of command for a particular officer, but that is within her discretion. She does not have a formal system for determining when or what particular conduct calls for such a report.

*3 Beck also offered in evidence excerpts of the deposition of Charles Moffit, Pittsburgh's Assistant chief of operations. Moffit is the first person in the police chain of command to review OPS findings. He stated that the Police Department will only take an officer's prior conduct into account in reviewing an OPS finding if OPS has sustained a complaint against the officer for that conduct.

In addition to the above, Beck introduced reports of specific civilian complaints against Williams for use of excessive force. In October 1990, OPS investigated a written complaint filed against Officer Williams by Demetrius Yancey. Yancey complained that for no apparent reason, Williams grabbed him and pushed his face hard against the police vehicle. The officer searched him and was verbally abusive. The OPS report of the case found: Yancey's brother, who was present at the incident, gave a statement to the investigator almost identical to the complainant's. Both brothers were questioned separately and there were no inconsistencies. "The Yancey brothers were very vehement on the denunciation of Officer Williams conduct and also they were believable." The report, however, recommended that the case be closed as not sustained because "there is [sic] no in depth corroborations of the allegations."

On April 10, 1991 OPS received a civilian complaint against Officer Williams from Dr. Irwin T. Templeton. OPS sent this complaint to Williams's commanding officer for investigation. The Chief of Police ultimately exonerated Officer Williams.

In June 1991, Dwayne Jones, a citizen, filed a complaint with OPS charging that while he was jogging, Officer Williams "for no apparent reason grabbed him and threw him into the rear of the police car ..." He was handcuffed and removed to a police station. Williams ignored Jones's complaints that the cuffs were too tight and hurting, searched him, found nothing, issued a citation and released him to a relative. The complaint was not sustained because "there wasn't any evidence to prove or disprove the allegations." The complaint also charged that Williams addressed him with obscene language and called him a "punk."

On July 8, 1991, Wayne Harvard filed a citizen's complaint with OPS charging Officer Williams with assaulting him and hitting him on the head and face with a billy club and with verbal abuse. Hospital records described the source of Harvard's injuries as a fall or beating with a club. Harvard admitted to falling in a foot chase but claimed that Williams struck him in the face causing some of the injuries. He alleged that after he put his hands behind his back as ordered, Williams put handcuffs on him and "took a billy club, a small billy club, and hit me on the side of the face." When Harvard inquired why the attack, Williams did not reply but "kept on hitting me and just beating me up" and called for back.

On November 4, 1993, the plaintiff in this case filed his handwritten complaint with OPS. In investigating this complaint, OPS also had written statements from each of Beck's friends who witnessed the alleged assault. The complaint was disposed of as "unfounded." In accordance with its practice, OPS made no reference to previous complaints against Officer Williams.

Slightly over two months later, on January 24, 1994, Donald Debold filed a complaint against Williams, who, with other officers, had come to his home to answer a domestic call. The officers questioned Debold three times as to whether he had hit anyone. When Debold answered in the negative,

Williams began to taunt him. Debold then said something to Officer Williams who responded by punching him in the jaw. OPS exonerated Officer Williams.

None of the foregoing complaints was sustained and none of them resulted in discipline. None of these dispositions was overruled by the Chief of Police or his assistant. However, the Police Department did discipline Officer Williams once: this action arose out of an internal police claim that he verbally abused a fellow police officer using language similar to that which Williams allegedly used in his past encounters with the civilian complainants. As the district court observed and counsel for the City agreed: "This shows that they treat a complaint by a fellow officer seriously."

Finally, Beck introduced OPS year-end reports, circulated through the Police Department, for the years 1991 and 1994.[5] The 1994 report revealed that OPS sustained an overall 3.4% of "use of force" complaints in the years 1990 through 1994. The 1991 report noted, inter alia:

> Use of force has been an issue in the past. Actual discipline for excessive force is very low. Unlike many other police departments, ours does not employ any formalized reporting mechanism for the use of force... This type of report allows objective evaluations of the use of force before complaints are filed. It would certainly identify points for retraining, and officers typically engaged in this behavior. We could develop a better understanding of the vague phrase "reasonable use of force," as incidents routinely reported could be audited and

---

[5] In its brief to this court, the City contends that Beck relies on incidents and reports that were not in evidence in making his case against the City before this court. We consider only the evidence admitted into evidence in making our decision in this appeal.

> properly examined... Most cases cannot be sustained because it is usually the officer and complainant on the scene only; and no neutral evidence is available. We do report patterns of cases to the Police Bureau however; e.g. an officer receiving three complaints in two months.
>
> The independent events do not indicate that the civilians conspired against one particular officer. The officer's credibility is at issue when a discernible pattern of complaints develop [sic]... officers and patterns like this will be focus [sic] of our "early I.D." program ... those that can't control their temper or use verbal skills properly, run the risk of aggravating the very situation which they are called upon to assist.

After Beck rested his case, the City moved for judgment as a matter of law. See Fed.R.Civ.P. 50(e). The district court granted the motion, holding that Beck failed to present sufficient evidence to prove that the City had a policy or custom authorizing the use of excessive force by its police officers.

II.

Federal Rule of Civil Procedure 50(a) provides, in pertinent part:

> *5 (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against

> that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed.R.Civ.P. 50(a)(1). This court's review of the district court's grant of judgment as a matter of law is plenary, and we must apply the same standard as the district court. See Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166(3d Cir. 1993). A motion for judgment as a matter of law under Federal Rule 50(a) "should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury and any verdict other than the one directed would be erroneous under the governing law." Macleary, 817 F.2d at 1083.

Beck claims that the City of Pittsburgh is liable for the injuries and damages he sustained at the hands of one of its police officers. He alleges that the City, "through its relevant officials, tolerated and acquiesced in a custom of excessive use of force by its police officers by permitting a situation to exist where police officers were not disciplined or subject to review for the use of excessive force against citizens." Beck brings this claim under 42 U.S.C. §1983, which provides, in relevant part:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...

42 U.S.C. §1983.

Because Beck's claim is not based on ordinary negligence or tort principles but on a federal civil rights statute, the City is not liable under the doctrine of respondent superior for the misconduct of its police. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). When a suit against a municipality is based on §1983, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Thus, although the municipality may not be held liable for a constitutional tort under §1983 on the theory of vicarious liability, it can be held responsible as an entity when the injury inflicted is permitted under its adopted policy or custom. Id. at 694.

*6 The Court's holding and reasoning in Monell have created a two-path track to municipal liability under §1983, depending on whether the allegation is based on municipal policy or custom. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481 & n. 10. 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). In Andrews, this court articulated the distinctions between these two sources of liability:

> A government policy or custom can be established in two ways. Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law.

895 F.2d at 1480 (citations omitted); see also Bielevicz v. Dibinon, 915 F.2d 845, 850 (3d Cir. 1990) (same). Custom, on which the plaintiff relies in this case, may also be established by evidence of knowledge and acquiescence. See Fletcher v. O'Donnell, 867 F.2d 791, 793 (3d Cir. 1989), cert. denied, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 591 (1989).

In City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), Officers of the Canton Police Department arrested Geraldine Harris. While being processed at the police station, she fell down several times and became incoherent. The officers did not summon any medical assistance for her. Sometime after her release she sued for damages under 42 U.S.C. §1983. The Court held that the inadequacy of police training may serve as the basis for §1983 liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 388 (footnote omitted). Although City of Canton involved a city's alleged failure to train its police officers, courts have adopted the "deliberate indifference" standard in other policy and custom contexts. See i.e., Simmons v. City of Philadelphia, 947 F.2d 1042, 1070 (3d Cir. 1991), cert. denied, 503 U.S. 985, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992); see also Karen M. Blum, Monell, DeShaney, and Zinermon: Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983, 24 CREIGHTON L. REV. 1, 13 (1990). This is consistent with the Court's narrow construction of municipal liability under 42 U.S.C. §1983 since Monell, limiting municipal liability to only those constitutional torts actually caused by the municipality. See Michael T. Burke & Patricia A. Burton, Defining the Contours of Municipal Liability Under 42 U.S.C. §1983: Monell through City of Canton v. Harris, 18 STETSON L. REV. 511, 547 (1989).

*7 In Simmons, 947 F.2d 1042, the plaintiff sued the City of Philadelphia under various theories of §1983 liability for failing to prevent her son from committing suicide while in police custody. The plaintiff alleged that the City failed to properly train its employees in the prevention of suicide of intoxicated detainees, and that the City's policy or custom led to her son's death.

We held, in Simmons, that:

> In order to establish the City's liability under her theory that Simmons's rights were violated as a result of a municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, plaintiff must have shown that the officials determined by the district court to be the responsible policymakers were aware of the number of suicides in City lockups and of the alternatives for preventing them, but either deliberately choose not to pursue these alternatives or acquiesced in a long-standing policy or custom of inaction in this regard.

Id. at 1064 (emphasis added).

In Bielevicz, the plaintiffs alleged a violation of §1983 against the City of Pittsburgh for a municipal custom of allowing its police officers to make illegal arrests for intoxication. We held that to sustain a §1983 claim for municipal liability, the plaintiff must "simply establish a municipal custom coupled with causation--i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations,

and that this failure, at lease in part, led to their injury."[6] 915 F.2d at 851.

In the instant case, Beck argues that Officer Williams has exhibited a pattern of violent and inappropriate behavior, with five complaints of excessive use of force in less than five years. These complaints include the Debold incident, which, although it occurred after Beck's experience, may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the use of excessive force. Beck asserts that if the City had proper investigative and police disciplining procedures in place, its police, including Williams, would not have pursued a settled practice of applying excessive force in arresting citizens, and Williams, in particular, would not have assaulted him.

The district court granted the City's motion for judgment as a matter of law, holding that Beck did not present sufficient evidence to show that the City had a policy or custom of authorizing the use of excessive force or abusive behavior. The court addressed plaintiff's counsel, stating:

> You would have the jury infer that because Williams was never disciplined, the City tacitly authorized the use of excessive force. But I think the law is clear that the jury can't make that assumption. Judge Cohill has an opinion in this court saying that isolated events will not establish a pattern of abusive

---

[6] We need not address the question of causation in the instant case because it was not a basis for the district court's judgment. We note, however, that proof of the existence of an unlawful policy or custom alone is insufficient to maintain a §1983 action. The plaintiff bears the burden of proving that the municipal practice was the proximate cause of the injuries suffered. Bielevicz, 915 F.2d at 850.

behavior.[7] Recitation of the number of complaints filled is not sufficient to prove a policy or custom. Policy or custom have to be established by knowledge and acquiescence. I think [the] absen[ce of] any evidence of a less than meaningful investigation or less than meaningful response to complaints of excessive force is fatal.

III.

*8 Under Federal Rule of Evidence 404(b), evidence of other wrongs or acts, although not admissible to prove the character of a person, are admissible for other purposes, such as proof of knowledge. What we have here are not mere isolated events or mere statistics of the number of complaints. On the contrary, the plaintiff offered in evidence a series of actual written civilian complaints of similar nature, most of them before and some after the Beck incident; containing specific information pertaining to the use of excessive force and verbal abuse by Officer Williams. All but one of the complaints had been investigated by OPS and had been transmitted through the police department chain of command to the Chief of Police.[8] Thus, he had knowledge of

---

[7] The case by Judge Cohill that the court referred to is Mariani v. City of Pittsburgh, 624 F.Supp. 506 (W.D.Pa. 1986). In Mariani, the plaintiff alleged that the City had a policy of condoning the use of excessive force by its police officers by repeatedly refusing to discipline the officers involved in an alleged assault, and retaining those officers on the force knowing they were dangerous. Id. at 511. The only evidence that the plaintiff put forth in that case was that each of the officers involved in the incident had one prior complaint against him for violent behavior. The court noted that "[i]solated events will not establish a pattern of abusive behavior." Id. at 511.

[8] Who is a policymaker is a question of state law. City of St. Louis v. Proprotnik, 485 U.S. 112, 142, 108 S.Ct. 915, 99 L.Ed. 2d

the complaints. But, under the sterile and shallow OPS system of investigation, each complaint was insulated from other prior and similar complaints and treated in a vacuum.

The testimony of witnesses to some of these incidents was rendered weightless by OPS in its disposition of the complaints merely because the witnesses had accompanied the complainant at the time of the incident. OPS appears to have assumed the credibility of Officer Williams's response, even though it recognized that "an officers's credibility is at issue when a discernible pattern of complaints develop. [sic]" (See infra OPS 1991 report) OPS appears to have attached no credibility, however, to the complainant's witnesses if they accompanied the complainant at the time of the incident, even if an OPS investigator found them believable. (See supra Yancey report) In the absence of testimony by witnesses having no connection with the alleged incident, OPS ultimately resolved almost all complaints against Williams or other officers on the narrow testimony of the complainant and the accused officer, thereby disposing of them unfavorably for the complaining citizen. OPS did not consider prior citizen complaints of an officer's excessive use of force as relevant in assessing a pending complaint, and manifested no interest in probing the credibility of the officer under investigation. Thus, it "did not report patterns of cases to the police bureau."

Without more, these written complaints were sufficient for a reasonable jury to infer that the Chief of Police of Pittsburgh and his department knew, or should have known, of Officer Williams's violent behavior in arresting citizens, even when the arrestee behaved peacefully, in orderly fashion, complied with all of the Officer's demands, and offered no resistance.

---

107 (1988). "In looking to state law, a court must determine which official has final, unreviewable discretion to make a decision or take an action." Andrews, 895 F.2d at 1481. It is undisputed in this case that the Chief of Police was a policymaker.

Because the complaints, especially those during the year 1991, came in a narrow period of time and were of similar nature, a reasonable jury could have inferred that the Chief of Police knew, or should have known, of Williams's propensity for violence when making arrests. See Parrish v. Luckie, 963 F.2d 201, 205 (8th Cir. 1992). Three of the 1991 complaints were filed between April and July.

*9 We reject the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. It is not enough that an investigative process be in place; as Beck's brief to us notes:

> That investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of redress when injustice is done. The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens.

None of the cases cited by the district court at trial support its conclusion that Beck's claim is barred simply because the City investigated his complaint, regardless of the adequacy of the investigation. In Brandon v. Hart, the Supreme Court mentions that twenty complaints were filed against the officer whose behavior precipitated the suit in that case, 469 U.S. 464, 466 n. 3, 105 S.Ct. 873, 83 L.Ed. 2d 878 (1985), but there is no discussion as to whether or not the Police Department had investigated those complaints. In Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987), cert. denied 848 U.S. 986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987), not only were there numerous complaints filed against the accused officer which were investigated, but in addition the officer was suspended for two days as the result of one of the complaints. Id. at 502. There is no discussion of the City's

procedures for handling complaints in Parker v. District of Columbia, 850 F.2d 708 (D.C.Cir. 1988), cert. denied, 489 U.S. 1065, 109 S.Ct. 1339, 103 L.Ed.2d 809 (1989). We did note in Bielevicz that the City-defendant in that case "followed an express policy of not investigating--or even accepting--complaints regarding alleged pretextual arrests" under a charge of public drunkenness, 915 F.2d at 849, but we never suggested that this was a requirement for a successful §1983 claim. See also Fletcher, 867 F.2d 791; Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).[9]

There are, on the other hand, very sound reasons to reject the rule that the district court implicitly suggests. Formalism is often the last refuge of scoundrels; history teaches us that the most tyrannical regimes, from Pinochet's Chile to Stalin's Soviet Union, are theoretically those with the most developed legal procedures. The point is obviously not to tar the Police Department's good name with disreputable associations, but only to illustrate that we cannot look to the mere existence of superficial grievance procedures as a guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights and liberties depends upon the substance of the OPS investigatory procedures. Whether those procedures had substance was for the jury's consideration.

*10 On reviewing the record, we find considerably more than Beck's complaints from which a reasonable jury could have found that the City's procedures are inadequate to protect civilians from police misuse of force. The OPS itself was structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers. Even if complainant's witnesses were credible, their testimony became inert under OPS policy, while at the same time police officers' statements appeared to have been given special, favorable consideration. A jury readily could have found the

---

[9] It should be noted that Herrera was abrogated on other grounds by City of Canton. 489 U.S. at 389 n.7.

Office of Professional Standards was nothing more than a facade to cover the violent behavioral patterns of police officers under investigation, to protect them from disciplinary action, and thereby perpetuate the City's custom of acquiescing in the excessive use of force by its police officers.

Because there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity, so long as they do not put themselves in a position to be observed by someone other than another police officer. As we noted in Bielevicz, "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future." 915 F.2d at 851.

Further, a jury would have had the benefit of OPS's 1991 year-end report, which OPS had circulated to police department officials and which Beck introduced into evidence. The 1991 OPS report brought to light several of the problems to which Beck refers. It recognized that the department had a problem with police use of excessive force, and that the procedures in place may be inadequate to respond to the problem. ("Use of force has been an issue in the past. Actual discipline for excessive force is very low."). It acknowledged that many complaints were effectively dismissed because no independent witness was at the scene to observe the encounter. ("Most cases cannot be sustained because it is usually the officer and complainant on the scene only; and no "neutral evidence is available."). And it conceded that repeated complaints against one officer may be cause for concern and some uncertainty as to that officer's veracity. ("The officer's credibility is at issue when a discernible pattern of complaints develop [sic]."). The report also suggested that better procedures "would certainly identify points for retraining, and officers typically engaged in this behavior."

Gedman testified that the City took no action subsequent to the 1991 report. The 1994 report showed that OPS had received 34 complaints of police officer violence

during the year 1991, none of which had resulted in disciplinary action. OPS statistics for 1992 and 1993 showed 39 and 38 civilian complaints of excessive police officer force respectively, and in 1994, an increase to 77 complaints.

*11 The City cites Bryant v. Whalen, 759 F.Supp. 410 (N.D. M. 1991) for the proposition that statistical information alone is insufficient to support a §1983 claim. In Bryant, the City of Chicago had a system similar to Pittsburgh's to investigate the use of excessive force by its police officers with an office, OPS, to do the investigation. OPS would determine if the complaint was "unfounded," "exonerated," "not sustained," or "sustained." It used a preponderance of the evidence standard of proof, which mandated a "not sustained" verdict if the evidence presented the OPS with only the complainant's word against the officer's word.

The plaintiffs alleged that several of Chicago's police officers assaulted them, and that these officers each had an extensive prior compliant history. One of the officers had 39 prior complaints of excessive use of force, none of which the OPS sustained. The plaintiffs presented statistical evidence revealing that the OPS sustains 6.2% of complaints per year. Id. at 421. They asserted that the low percentage of sustained complaints, and the repeated allegations against the defendant police officers, proved that the City showed deliberate indifference to the constitutional rights of its citizens.

The district court in Bryant held that statistics alone of unsustained complaints of excessive use of force, without evidence that those complaints had merit, will not suffice to establish municipal liability under §1983. Id. at 424. See also Strauss v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985)(finding statistics insufficient to prove municipal liability because people may file complaints "for many reasons, or for no reason at all.")

Bryant, even if it were precedential and/or persuasive, is distinguishable from the instant case. Beck presented

considerably more than mere statistics. He also presented evidence of actual written civilian complaints. Further, he presented evidence that the City of Pittsburgh has no formal system in place for tracking complaints against its officers and that the citizen complaints were not isolated incidents.

Finally, in colloquy with counsel, the trial court indicated that the absence of expert testimony to support plaintiff's case was a factor that influenced its decision to enter judgment as a matter of law. To the extent that Gedman herself brought to light deficiencies in her own departments procedures, we see little need for the use of expert testimony to confirm her own insights. As for drawing inferences from the evidence regarding the adequacy of the investigatory process, we again agree with Beck that "[t]o require expert testimony to prove this fact is ridiculous. It is not beyond the ken of an average juror to assess what a reasonable municipal policymaker would have done with the information in this case."

IV.

*12 In sum, we draw no conclusion as to whether the evidence presented by Beck supports a determination that Pittsburgh policymakers knew about and acquiesced in a custom that tolerated the use of excessive force by officers of the Police Department. We do conclude, however, that Beck presented sufficient evidence from which a reasonable jury could have inferred that the City of Pittsburgh knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers. This evidence sufficiently precluded the entry of judgment as a matter of law by the district court.

Accordingly, the judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

Costs taxed against the City of Pittsburgh, appellee.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT G. BECK,
Plaintiff,

v.

THE CITY OF PITTSBURGH,
Defendant.

Civil Action No. 94-156

OPINION

Entered: May 11, 1995

THE COURT: I have read all these cases. I have read, I bet, 50 more than either of you have read. I have not yet found a case that said statistics in and of themselves prove this. In fact, I have found several cases that say exactly the opposite. And it seems to me that would make sense. If we were to take statistics that show that of a large number of complaints there were only a small number of disciplinary actions taken and transposed those statistics into sufficient proof to show deliberate indifference on the part of the municipality and the use of excessive force by police officers, I think that it would be absurd. I think it would be absurd. There are many reasons why a citizen might file a complaint about a use of excessive force. Or there might be no reason at all why a citizen files a complaint. But to say that the filing automatically gives the allegation merit is just not something that I think follows. You know, basic common sense tells you that.

MR. FITCH: Your Honor, I am not saying that the mere filing of the complaint is what proves that the

City had notice that Officer Williams had dangerous and unconstitutional propensities. But what I am saying is that the combination of all of those complaints is what proves that, and that they had notice before this particular incident happened. They should have done something. I think it is for the jury to decide whether or not the similarity of - - -

THE COURT: What you are saying is what they did wasn't sufficient. That is what you are saying, what they did wasn't sufficient.

MR. FITCH: Yes. And I am saying they had an inadequate investigation.

THE COURT: Where is the evidence of the inadequacy of the investigation? Just show me. Because every other case I have read, there is evidence.

MR. FITCH: Well, the facts. He was beaten in the same way that the other three people before him were treated. Well, there were four. There was Templeton then there was Yancey. And he said - -

THE COURT: You are saying that is your only evidence, Mr. Beck's testimony.

MR. FITCH: No, I am saying - - well, the four complaints that were brought and either not sustained, found unfounded, or exonerated. That therefore after that number comes in that close proximity of time and they don't do anything about it, that is acquiescence. It is deliberate indifference, and it is acquiescence. I think the jury could find that based on that evidence.

THE COURT: Mr. Schulberg, any response?

MR. SCHULBERG: Yes. The only thing I would like to say, Judge, is that I don't believe I am making a ludicrous argument here on behalf of the city. And as far as public policy is concerned, I do think that based upon just raw numbers of complaints being filed against an officer would cause the City of Pittsburgh to lose a great number of police officers. Merely because some citizen has filed a complaint doesn't mean that we then got to watch over them. That is

why we have this investigative branch in place. And I am not going to walk out of here - - if I am successful on this motion or successful in this trial, I am not going to walk out of here with my head low because I have gotten out of here on some technicality. I think the City of Pittsburgh is entitled to judgment as a matter of law because we have not done anything unconstitutional here. We have the procedures in place. They work, and they were successful.

MR. FITCH: Well, Your Honor, I think based on what he just said, it is for the jury to determine whether they were successful and whether they worked in this instance. I just have on other, Judge Sloviter's concurrence. I think the - -

THE COURT: In Simmons?

MR. FITCH: Yes. I think that is a recent Third Circuit case which lays out or somewhat lays out and shows that there is a difference in terms of how the various judges on the third circuit look at this. I mean, Judge Sloviter says the failure of a municipality to fulfill the duty to guard against foreseeable harm when its officials have knowledge of circumstances making that harm likely is clearly reckless and culpable conduct.

THE COURT: Let me just say this about Simmons because now that we are on Simmons, I had a very wise professor who used to say the facts make it law. In Simmons the statistics were considered by the court in conjunction with four witnesses. First of all, there was a police officer who was responsible for drafting department policy and procedure. He testified that there was absolutely no policy at all in place in the City of Philadelphia dealing with training and suicide prevention. And there was another police officer, the defendant, as I believe, the individual defendant police officer who testified that he had received no training at all in suicide prevention with regard to his duty. Then there were two expert witnesses. One of the experts said that the deceased inmate, the one who had committed suicide, was

clearly a predictable suicide candidate. And this expert testified his death was the product of deliberate indifference on the part of the City of Philadelphia. That was expert testimony given in that case. The second expert testified about the correlation between inmates incarcerated for public intoxication who committed suicide and further said that the deceased inmate was a prime candidate to be a suicide given the circumstances under which he was incarcerated, and, again, the product of deliberate indifference on the part of the City of Philadelphia. So Judge Sloviter's comments I totally agree with, but there is all kinds of evidence to support the inadequacy of what the city did. We have got expert testimony as well as police testimony.

MR. FITCH: But, Your Honor, she was responding to those requirements. She was responding to Judge Becker's statements making it a much higher standard to meet. She was saying it shouldn't be that high a standard. That's what I understand her - -

THE COURT: She never said you don't need that expert testimony.

MR. FITCH: I think it is implicit in what I have just quoted to you, Your Honor.

THE COURT: A couple of the cases I want to review just briefly with you on the record. Herrera, for instance, the testimony was that the city council was given citizen complaints about police misconduct. The evidence introduced in the case was that there was no response, no action at all. There was nothing done with complaints, not a thing, in spite of the fact that there was a county attorney's report critical of department policy which was just ignored by the city. So that is the kind of evidence that existed in Herrera.

In Fletcher versus O'Donnell the evidence was that there was absolutely no investigation of the citizen complaints. The complaints were received and nothing more was done.

In Harris versus City of Pagedale the evidence was that the city failed to even receive, let alone investigate or act on a complaint.

In Bielevicz verses Dubinon the evidence was that the police department procedures were inadequate. Someone got up on the stand and said these procedures are inadequate to address a known problem. There was also further evidence in that case about the failure to even receive complaints concerning public intoxication arrest.

In Brandon versus Hart cited by you, Mr. Fitch, the Supreme Court case, in the district court level there was evidence again somebody came up and said these police department procedures are sufficient for discovering police misconduct.

In Parker verses District of Columbia no discipline was imposed even though there was an internal order from the police department recommending that discipline be imposed.

MR. FITCH: I guess I am saying that there was no adequate investigation, Your Honor. I know I have said that before, so I guess I don't have to say that again. It seems to me that if you allow them to do their own investigation and hide behind that, that doesn't - -

THE COURT: I think you could have conducted discovery or produced a witness to say that, but you didn't. And I think that is fatal to your case. I do.

You would have the jury infer that because Williams was never disciplined, the city tacitly authorized the use of excessive force. But I think the law is clear that the jury can't make that assumption. Judge Cohill has an opinion in this court saying that isolated events will not establish a pattern of abusive behavior. Recitation of the number of complaints filed is not sufficient to prove a policy or custom. Policy or custom has to be established by knowledge and acquiescence. I think absent any evidence of a failure to investigate or evidence of a less than meaningful investigation or less than meaningful response to complaints of excessive force is fatal.

There is a case that is almost exactly like this case from the Northern District of Illinois, Bryant verses Whalen, 759 Fed Sup 410. The City of Chicago has an OPS system identical to the one in this case. They had a civilian neutral investigative agency. The complaints were disposed of by either being sustained, not sustained, unfounded or exonerated. In that case the plaintiff alleged excessive use of force by two police officers. He presented statistical evidence by way of affidavit because this was done on summary judgment, but in the City of Chicago only a small percentage of excessive force complaints are found to have merit. Also, the two police officers in that case had prior excessive complaints. One had 39. The other had five. All of them were not sustained. The court said in the absence of any evidence that the OPS findings and prior incidents were wrong or that the investigations were perfunctory, the claim cannot go forward. The court held that the statistics in themselves were proof of nothing, much less than deliberate indifference. And the fact that there was no evidence of a wrong result reached on any prior OPS investigation or the existence of a perfunctory investigation was fatal to plaintiff's complaints.

That was, of course, decided on a summary judgment motion, and most of these cases were decided on summary judgment. But, again, there was no summary judgment motion filed here.

MR. FITCH: Well, had there been, Your Honor, I would have had the opportunity to engage an expert, if there had been, if it had been raised at that point in time. The city was well aware of what I was arguing. And, you know, based on the pretrial statement, they knew how we intended to prove this. They could have moved for summary judgment. Of course, I would request that we continue this case so that I can get the expert testimony because I think that would be appropriate under Rule 15, 15-B. I think I have seen a case, but to be honest with Your Honor, I can't recall, that says you can continue a case.

THE COURT: I think you have rested, Mr. Fitch. I think it is clear that it is not time to continue a case.

MR. FITCH: Okay.

THE COURT: This doesn't -- it's not because I think there is a claim here or I think that there isn't a claim. I don't know. But I think I have looked for three days now since you came in and said on Monday morning or whenever that you were going to drop your claim against Officer Williams and pursue the claim against the city. Looking at the complaint and seeing there was no allegation of policy, custom, I have been looking for days to find something that supports your position, and I have been unable to do so. I think that you may have established knowledge of or notice of some potential problem on the part of the city by Officer Williams, but the record is absent of any proof of acquiescence, and I don't think there is anything that I have to do except grant Mr. Schulberg's motion and determine as a matter of law that the evidence presented by the plaintiff is insufficient for a reasonable jury to find for the plaintiff against the City of Pittsburgh. So I am granting defendant's motion for judgment as a matter of law, and I am going to dismiss the jury. And I don't think I have to do that on the record by bringing them back in. I can just put it on the record that is my finding in this case.

MR. SCHULBERG: Do you want us to stay?

THE COURT: Unless you want to. It is not necessary. I think it is all right to be on the record.

MR. SCHULBERG: Thank you.

MR. FITCH: Thank you, Your Honor.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT

Robert BECK,
Appellant,

v.

CITY OF PITTSBURGH,
Appellee.

No. 95-3328.

Entered: October 24, 1996

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and ROSENN, * Circuit Judges

The petition for rehearing filed by
Appellee, city of Pittsburgh,
in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court
/s/ Sloviter
Chief Judge

---

* Hon. Max Rosenn, Senior Circuit Judge, as to panel rehearing only.